

Before the House State Administration Committee

January 14, 2009

Testimony of Mark Cadwallader, Dept. of Labor and Industry

House Bill 117

Good morning, Mr. Chairman and members of the Committee. My name is Mark Cadwallader. I am a staff attorney for the Montana Department of Labor and Industry, and have been involved with the administrative rule process in the Department for the last 16 years or so, as a rule writer, as the presiding officer at rules hearings, and as an agency rule reviewer.

This bill's provision of a special privilege of a 60 day advance look at a rule proposal, given to Legislature but not granted to ordinary citizens, is hard to understand, and will be tough to explain to the public. Why should the Legislature get more time to look a proposed rule changes than do the members of the public that will be directly affected by the rule?

The Legislature is certainly free to change the timelines for the amount of public notice and public comment from the existing minimum 28 days. If the Legislature decides to expand that timeline to 60 or 90 days, I can accept that, and will carry out the law. What is hard to accept is why the Legislature feels that it needs an extra 60 days, time not available to ordinary citizens, businesses and members of the public, to review rule proposals.

Whether it is good public policy to slow down agency rulemaking by at least 2 months is for the Legislature to decide. I do note that a significant percentage of rule changes that are proposed are in response to requests from outside the agency, or to implement newly enacted legislation. When the Legislature enacts a law that requires rulemaking to put into effect, the public will not be able to get the benefit of that law as promptly as might otherwise be possible if you add institutional delays into the Montana Administrative Procedure Act.

As an example, there was a bill from last session that allows the Department of Labor and Industry to change the way medical providers are reimbursed for providing treatment to injured workers under the workers' compensation system. This bill would have delayed the implementation of those streamlining and cost saving measures by further delaying the rule making that was needed to change those fee schedules.

As a technical question, I wonder what is supposed to happen during the 60 day pre-filing review period if the agency or its customers find a way to improve the rule? The rule proposal, during the 60 days that the Legislature has it before the agency can file the initial Notice of Public Hearing on the proposal, will be a public document. It will, at least with the Department of Labor, be shared with the key players who are affected by the proposal – since we typically work with them during the drafting phase anyway. If any of us see a way to improve the proposed text, will we be able to incorporate those improvements in the document to be filed with the Secretary of State, or will we have to go back and re-submit the improved version for another 60 day period? I have to ask what is the purpose of the pre-filing review process – to improve the final product or simply to delay the adoption of administrative rules?

I also note that occasionally, the Department makes a rule proposal and during the hearing and public comment process, as a result of that comment, we find out that we made an error or did not adequately address a particular issue. Sometimes the fix required is significant enough that we decide to re-notice the rule with the corrections. Would that be considered to be a rule-making proposal under Section 1 of this bill which requires the 60 day advance submission to the Legislative Services Division? The bill does not specifically address that situation. If the bill was enacted in its current form, I would have to advise the Department of Labor and Industry that we needed to submit it for the 60 days

pre-filing review, rather than run the risk of having the rule be invalidated for failure to comply with the statute.

I also note that under existing law, the Legislative Services Division already reviews all agency rulemaking proposals. Interim committees, as part of their regular agenda, already set aside time to discuss agency rulemaking proposals. Under existing law, interim committees have fairly broad powers to demand more information from agencies about a rulemaking proposal. The statutes even say that an interim committee can delay the implementation of rules. The Legislature already can repeal any rule by bill, and the Legislature can be polled even when it is not in session to determine whether a rule is consistent with the legislature's intent.

Part of this bill establishes an additional office in the Legislative Services Division to do nothing but review proposed and existing administrative rules. If the Legislature needs more staff to assist it in doing its work, that is a matter for the Legislature to decide. I do want to point out that with additional staff it should make it easier for LSD to review rules within the existing timelines. Whether it makes sense to have the Legislature's rule review functions duplicated between this new office and the existing interim committees is being addressed by others this morning. But it seems to me that the Legislature typically discourages duplication of functions within state government.

I strongly urge that this committee do not concur with the provisions of Section 1 of the bill. Whether you table the whole bill or strip out section 1 is, of course, up to you. Either way, I urge you to resist the temptation to enact special legislative privileges not available to ordinary Montanans. Thank you.

prepared by:

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